Editor's note: 98 I.D. 38

PACIFIC COAST COAL CO., INC.

IBLA 91-121 Decided Februaary 28, 1991

Petition for discretionary review of a decision by Administrative Law Judge Ramon M. Child sustaining agency denial of a permit revision. Hearings Division Docket No. IBLA 90-201 (Permit No. WA-0007A).

Petition granted; Administrative Law Judge decision affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally--Words and Phrases

   "Excess spoil." Spoil needed for returning disturbed land to its approximate original contour is not "excess spoil."

2. Surface Mining Control and Reclamation Act of 1977: Federal Program: Permits--Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Revisions--Surface Mining Control and Reclamation Act of 1977: Postmining Land Use: Generally--Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally

   OSM may approve the creation of a permanent impoundment of water on a mine site when the operator demonstrates that the impoundment complies with sec. 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(28) (1988), and the implementing regulations. The spoil which otherwise would have been returned to the mined-out area, as well as the areas upon which the spoil is placed, must further comply with the AOC requirements of sec. 515(b)(3)

of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), and 30 CFR 816.102. OSM properly denies a permit revision application in which the proposal to create a permanent water impoundment involves retaining the spoil piles as permanent topographical features which do not con-form to the AOC of the area prior to the surface min-ing and reclamation operations.

APPEARANCES: Brian E. McGee, Esq., Denver, Colorado, for Pacific Coast Coal Company, Inc.; John R. Kunz, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; Harold P. Quinn, Jr., Esq., for amicus curiae National Coal Association.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Pacific Coast Coal Company, Inc. (Pacific Coast), has filed a petition for discretionary review of a decision by Administrative Law Judge Ramon M. Child, dated December 5, 1990, sustaining the denial by the Chief, Federal Programs Division, Office of Surface Mining Reclamation and Enforcement (OSM), in Denver, Colorado, of Pacific Coast's application to revise OSM permit No. WA-0007A for the John Henry No. 1 Mine in King County, Washington. 1/

OSM issued Permit No. WA-0007 for the John Henry No. 1 Mine under the Washington Federal Program effective June 13, 1986. On February 27, 1989,

1/ The National Coal Association (NCA) has filed a "Petition to Intervene as Amicus Curiae in Support of Appellant Pacific Coast Coal Company." We grant the petition and have considered NCA's arguments in reaching our decision. 43 CFR 4.1110(e).

Pacific Coast submitted a permit revision application with respect to Permit No. WA-0007, proposing to revise the approved reclamation plan to reclaim Pit No. 1 as a permanent impoundment, and to reclaim the spoil piles to no greater than 3h:1v [33%] slopes when mining operations cease under the permit. By memorandum dated October 27, 1989, the Project Manager, Federal and Indian Permitting Branch, OSM, recommended to the Chief, Federal Programs Division, OSM, that the permit revision application be disapproved (Decision Memorandum). By letter dated October 30, 1989, the Chief, Federal Programs Division, notified Pacific Coast that OSM "has disapproved the permit revision application submitted * * * for a revi-sion to the reclamation plan to create a 'final-cut lake' at the John Henry No. 1 Mine," and that Pacific Coast "may appeal this decision under the procedures set out in 43 CFR 4.1280 to 4.1286."

Accordingly, Pacific Coast appealed the decision of the Chief, Federal Programs Division, to this Board. However, the Board dismissed Pacific Coast's appeal and referred the matter to the Hearings Division in accordance with the regulations at 43 CFR 4.1370-.1379, which "set forth the procedures for obtaining review of decisions by OSM concerning permit revisions, permit renewals, and the transfer, assignment, or sale of rights granted under permits." 43 CFR 4.1370; see Pacific Coast Coal Co., 113 IBLA 384 (1990). Judge Child's consequent decision is the subject of Pacific Coast's petition for discretionary review. We have given the matter expedited consideration. Pacific Coast Coal Co., supra at 386; see 43 CFR 4.1379; 56 FR 2139, 2144-45 (Jan. 21, 1991).

On July 26, 1990, Pacific Coast and OSM submitted to Judge Child a "Stipulation of Undisputed Facts," which we set forth below in order to provide the factual background of this case:

> A. The petitioner, PCCC, currently operates its John Henry No. 1 surface coal mine (the John Henry Mine) in King County, Washington, under Washington Federal program Permit No. WA-0007. Permit No. WA-0007 was issued to PCCC by the respondent, OSM.
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> B. The John Henry Mine is located 25 miles southeast of Seattle, Washington. The current 5-year mine plan covers a permit area of 422 acres, and the life-of-mine plan includes 516 acres. The current bonded disturbance area within the permit area covers approximately 185 acres.
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> C. The Technical Analysis ("TA") for PCCC's approved permit application package states that the permit area is located in the southeastern portion of the Puget Sound lowland, a broad undulating glacial drift plain. The Green River flows through a deep gorge approximately 2 miles east of the site. The topography of the area is generally low in surface relief, with elevations in the permit area ranging from 600 to 850 feet above mean sea level.
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> D. The pre-mining land use of the property was forestry.
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> E. Pursuant to Permit No. WA-0007, the approved post-mining land use of the property is forestry.
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> * * * * * * *
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> G. * * * [T]he three (3) overburden spoil piles on Exhibit "C" are identified and hereafter referred to as follows: the overburden spoil pile to the northeast of Pit No. 2 is "Spoil Pile No. 1;" the overburden spoil pile to the northwest of Pit No. 2 is "Spoil Pile No. 2;" and the overburden spoil pile to the southwest of Pit Nos. 1 and 2 is "Spoil Pile No. 3."
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> H. Pursuant to the approved permit application package for Permit No. WA-0007, Spoil Pile Nos. 1, 2 and 3 are temporary structures. The approved permit application package also provides that Pit Nos. 1 and 2 will be completely backfilled and graded to within three (3) feet of the original topography using materials from these temporary structures. Pursuant to the permit application package described in OSM's TA and the life-of-mine reclamation plan described in both the NEPA and SEPA EIS's for Permit

No. WA-0007, Spoil Pile No. 1 is designated as a permanent structure, approximately 40-60 feet higher than the pre-mining topography, and is designated as excess spoil. [2/]

I. In the life-of-mine plan described in the NEPA and SEPA EIS's for the John Henry Mine, Pit No. 1 is to be reclaimed as a permanent impoundment.

J. On or about February 27, 1989 (as modified through the date of OSM's decision of October 27, 1989), PCCC submitted to OSM a permit revision application for Permit No. WA-0007. PCCC's permit revision application proposes that the approved permit be revised to allow: (l) the final reclamation of Pit No. l as a permanent impoundment and (2) the retention of Spoil Pile Nos. 1 and 2 and a portion of Spoil Pile No. 3 as permanent topographical features. * * *

K. * * * [P]roposed permanent Spoil Pile No. 2 would be approximately 80 feet higher than the pre-mining topography, and its slopes would be graded to 3h:1v or less.

L. * * * [P]roposed permanent Spoil Pile No. 3 would be approximately 20-40 feet higher than the premining topography and would be graded relatively flat on top, with a maximum of 3h:1v slopes along portions of its perimeter.

2/ In order to clarify any apparent contradiction between the last sen-tence of this stipulation and the first two, we observe that in its technical analysis of Pacific Coast's permit revision application, dated July 11, 1989, OSM stated:

"Under the reclamation and operation plan of the currently approved permit application, Pit 1 and Pit 2 will be completely backfilled using the spoil from the approved temporary spoil piles, and any remaining spoil will be graded to the approximate original contour. As currently approved, the reclaimed postmining topography will be within 3 feet of the premining topography."

In his memorandum dated Oct. 27, 1986, recommending to the Chief, Federal Programs Division, OSM, that Pacific Coast's permit revision application be disapproved, the Project Manager, Federal and Indian Permitting Branch, OSM, set forth the factual background of this case, including the following statement regarding the return of the spoil to approximate original contour:

"The current reclamation plan, approved in 1985, requires both Pit 1 and Pit 2 to be completely backfilled using the materials from the temporary out-of-pit spoil piles. Any remaining spoil will be used to restore the approximate original contour. As currently approved, the reclaimed postmining topography will be within 3 feet of the premining topography."

In its appeal brief before Judge Child, Pacific Coast stipulated to the facts as narrated by the Project Manager (Appeal Brief before Judge Child at 4).

M. Pursuant to PCCC's permit revision application, mined-out Pit No. 1 would remain as a permanent impoundment. To create the permanent impoundment, mined-out Pit No. 1 would be partially back-filled from Spoil Pile No. 3 and graded to a 3h:1v slope down to approximately 6 feet below the low-water elevation of the proposed impoundment.

N. Pursuant to PCCC's permit revision application, the proposed permanent impoundment would have an approximately 31-acre surface area and would impound approximately l,600 acre feet of water, with a maximum depth of approximately 150 feet and an arithmetic average depth of approximately 55 feet.

O. Pursuant to the permit application package described in OSM's TA and the life-of-mine reclamation plan described in both the NEPA and SEPA EIS's for approved Permit No. WA-0007, the slopes and configuration of Spoil Pile No. 1 are suitable for the post-mining forestry land use.

P. The topographic map attached hereto as Exhibit A illustrates that the slopes in the vicinity of the John Henry Mine site often exceed 3h:1v.

Q. In order to obtain complete recovery of the surface minable reserves at the John Henry Mine, approximately 7,000,000 cu. yds. of spoil from Pit Nos. 1 and 2 will be removed and placed in external Spoil Pile Nos. 1, 2 and 3 dur-ing the first five (5) years of operation. Pursuant to its permit revision application, PCCC would return approximately l,300,000 cu. yds. from Spoil Pile No. 3 to Pit No. 1.

R. Pursuant to the life-of-mine reclamation plan as described in the original permit application package and the NEPA and SEPA EIS's for Permit No. WA-0007, after the first five (5) years of operation, approximately 21,000,000 cu. yds. of spoil will be mined and retained directly in the pits.

S. There are no known differences between the overburden material (spoil) in Spoil Pile Nos. 1, 2 and 3, except for the location of placement. Each pile represents spoil removed from the mined out areas which could not be immediately backfilled because it would interfere with mining and coal recovery operations.

T. The Washington State Department of Natural Resources (the responsible State agency for review and comment on Federal mining and reclamation applications), King County Grading Section (Building and Land Development Division), and the U.S. Fish & Wildlife Service have reviewed the proposed permit revision and have not raised any objections regarding the retention of Spoil

Pile No. 2 and a portion of Spoil Pile No. 3 as permanent topographical features.

U. The landowner, Palmer Coking Coal Company, supports the proposed permit revision.

V. For the sole purpose of this adjudication, PCCC's compliance with applicable permanent impoundment criteria and the proposed post-mining land use is not disputed.

On October 27, 1989, the Chief, Federal Programs Division, OSM, formally disapproved Pacific Coast's John Henry No. 1 Mine permit revision application, citing the following reasons:

1. The proposed revision does not comply with the requirements of 30 CFR 816.102(a) to eliminate spoil piles and achieve approximate original contour [AOC].

2. PCCC did not provide the information required at 30 CFR 816.133 for approval of the alternative land use of the proposed permanent impoundment.

3. PCCC has not demonstrated that the proposed impoundment will be suitable for its intended uses as fish and wildlife habitat and for fire protection. PCCC has not demonstrated that the size and configuration of the proposed permanent impoundment is adequate for its intended purpose.

4. The permit revision application does not include a fish and wildlife resources protection and enhancement plan that discusses how, to the extent possible using the best technology currently available, PCCC will minimize disturbances and adverse impacts on fish and wildlife and related environmental values dur-ing the surface coal mining and reclamation operations, and how enhancement of the fish and wildlife resources will be achieved in the affected area.

5. The revegetation success standards in the revegeta-tion plan do not comply with 30 CFR 947.780.18(b)(5)(vi) and 947.816.116(b)(3).

6. PCCC has not adequately updated the probable hydrologic consequences (PHC) determination and hydrologic reclamation plan (HRP).

7. PCCC has not adequately demonstrated the long-term stability of the impoundment slopes.

(Decision Memorandum at 12).

On July 26, 1990, Pacific Coast and OSM jointly filed with Judge Child a "Request for Dismissal of Undisputed Issues and Stipulation of Disputed Issue" (Stipulation Dismissing and Designating Issues). They agreed that OSM's reasons numbered 3 and 5 for denying Pacific Coast's application were resolved in Pacific Coast's favor and are no longer in dispute. Moreover, they agreed that, contingent upon Pacific Coast's submission of additional technical information, OSM's reasons numbered 2, 4, 6, and 7 were resolved in favor of Pacific Coast and are not disputed by the parties. Finally, Pacific Coast and OSM stipulated that the sole remaining issue for adjudication is "[w]hether PCCC's modified permit revision application was legally deficient because it failed to comply with the requirements of 30 CFR 816.102(a) to eliminate spoil piles and achieve approximate orig-inal contour." Id. at 3.

On July 31, 1990, Judge Child entered an order approving, as modi-fied, the Stipulation Dismissing and Designating Issues. He dismissed all the issues set forth in the Stipulation, and stated that "[t]he sole issue to be adjudicated in this proceeding is: Do the requirements of 30 CFR 816.102(a) render PCCC's modified Permit Revision Application legally deficient by reason of failure to eliminate spoil piles and achieve approximate original contour" (Order dated July 31, 1990, at 2).

Thus, we turn our attention to the "sole issue" involved in this appeal. At this point, we will set forth the statutory and regulatory framework within which Pacific Coast's permit revision application must be evaluated. We begin with section 515(b) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1265(b) (1988), which provides in relevant part:

> General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to--
>
> * * * * * * *
>
> (3) except as provided in subsection (c) of this section with respect to all surface coal mining operations backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all high-walls, spoil piles, and depressions eliminated[.] [Emphasis added.]

Subsection (c) of section 515 of SMCRA sets forth a rather specific exception to the requirement to restore the AOC of lands affected by surface coal mining and reclamation operations. Subsection (c)(2) provides that

> a permit without regard to the requirement to restore to approximate original contour set forth in subsection (b)(3) or (d)(2) [3/] and (3) of this section may be granted for the

3/ Subsection (d)(2) of section 515 of SMCRA, 30 U.S.C. § 1265(d)(2) (1988), applies the AOC requirement to steep-slope surface coal mining. Subsection (e)(2) of section 515 of SMCRA provides for a variance from the requirement to restore disturbed land in steep-slope areas to AOC, provided the operator meets the criteria set forth in subsection (e)(3) and (4).

In In re Permanent Surface Mining Regulation Litigation, 620 F. Supp. 1519 (D.D.C. 1985), the U.S. District Court for the District of Columbia ruled that regulations promulgated by the Department allowing variances

> surface mining of coal where the mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill * * * by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining, and capable of supporting postmin-ing uses in accord with the requirements of this subsection. [Emphasis added.]

The applicability of section 515(c)(2) of SMCRA is plainly limited to the removal of an "entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill." Pacific Coast does not argue that it meets the exception embodied in section 515(c)(2) of SMCRA. Thus, the general AOC requirement of section 515(b)(3) would appear to be applicable to Pacific Coast's John Henry Mine No. 1 operations, since the stated exception, by its terms, does not apply.

Section 701(2) of SMCRA, 30 U.S.C. § 1291(2) (1988), defines "approximate original contour" as

> that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated[.] [Emphasis added.]

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fn. 3 (continued)
from the AOC requirement in non-steep-slope areas were inconsistent with SMCRA. See 30 CFR 785.16 and 816.133(d) (48 FR 39904, Sept. 1, 1983). The District Court's ruling was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit (Circuit Court) in National Wildlife Federation v. Hodel, 839 F.2d 694, 761-64 (D.C. Cir. 1988). Accordingly, OSM suspended 30 CFR 785.16 and 816.133(d), effective Dec. 22, 1986, insofar as those regulations authorize any variance from AOC for surface coal mining operations in any area which is not a steep-slope area. 51 FR 41952, 41961-62 (Nov. 20, 1986).

This definition provides, however, that "water impoundments may be permitted where the regulatory authority determines that they are in compliance with section 1265(b)(8) of this title[.]"

Section 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(8) (1988), provides that the permittee may "create, if authorized in the approved mining and reclamation plan and permit, permanent impoundments of water on mining sites as part of reclamation activities[.]" Such an impoundment may be approved only when the operator has adequately demonstrated that:

> (A) the size of the impoundment is adequate for its intended purposes;
>
> (B) the impoundment dam construction will be so designed as to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Public Law 83-566 (16 U.S.C. 1006);
>
> (C) the quality of impounded water will be suitable on a permanent basis for its intended use and that discharges from the impoundment will not degrade the water quality below water quality standards established pursuant to applicable Federal and State law in the receiving stream;
>
> (D) the level of water will be reasonably stable;
>
> (E) final grading will provide adequate safety and access for proposed water users; and
>
> (F) such water impoundments will not result in the diminu-tion of the quality or quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial[,] recreational, or domestic uses. [Emphasis added.]

Section 515(b)(8)(A)-(F) of SMCRA, 30 U.S.C. § 1265(b)(8)(A)-(F) (1988).

The Departmental definition of "approximate original contour," set forth at 30 CFR 701.5, is parallel with the definition at section 701(2) of SMCRA, set forth above. Similarly, the definition at 30 CFR 701.5 provides that "[p]ermanent water impoundments may be permitted where the regulatory authority has determined that they comply with 30 CFR 816.49 [4/] and 816.56, [5/] 816.133 [6/] or 817.49 [7/], 817.56, and 817.133."

[1] The provisions of 30 CFR 816.102 provide:

> (a) Disturbed areas shall be backfilled and graded to--
>
> (1) Achieve the approximate original contour, except as provided in paragraph (k) [8/] of this section;

4/ The provisions of 30 CFR 816.49(b) set forth the criteria applicable to the creation of permanent impoundments, and parallel the criteria found at section 515(b)(8)(A)-(F), concerning size and configuration of the impoundment, quality of impounded water, final grading of the impoundment, water quality and quantity utilized by adjacent or surrounding landowners, and suitability for the approved postmining land use.

5/ Under 30 CFR 816.56, the operator is subject to specific rehabilitation requirements with regard to impoundments before abandoning the permit area or seeking a bond release.

6/ As noted in footnote 3, on Nov. 20, 1986, the Department suspended 30 CFR 816.133 insofar as it authorized any variance from AOC for surface coal mining operations in any area which is not a steep-slope area. 51 FR 41962.

7/ The regulations at 30 CFR 817.49, 817.56, and 817.133 set forth the criteria applicable to the creation of permanent impoundments incident to underground coal mining, and mirror the regulations at 30 CFR 816.49, 816.56, and 816.133. On Nov. 20, 1986, 30 CFR 817.133(d) was suspended by the Department to the extent it provided authority for granting a variance from AOC requirements in non-steep-slope areas. See 51 FR 41962 (Nov. 20, 1986).

8/ Paragraph (k) of section 816.102 provides that "[t]he postmining slope may vary from the approximate original contour when * * * [a]pproval is obtained from the regulatory authority for * * * [a] variance from approximate original contour requirements in accordance with § 785.16 of this chapter." The provisions of 30 CFR 785.16 reflect the exception to the general requirement to return disturbed areas to AOC found at section 515(c) of SMCRA, 30 U.S.C. § 1265(c) (1988), concerning proposed postmining uses of

(2) Eliminate all highwalls, spoil piles, and depressions, except as provided in paragraph (h) (small depressions) and in paragraph (k)(3)(iii) (previously mined highwalls) of this section[.]

* * * * * * *

(b) Spoil, except excess spoil disposed of in accordance with §§ 816.71 through 816.74, shall be returned to the mined-out area.

* * * * * * *

(d) Spoil may be placed on the area outside the mined-out area in non-steep slope areas to restore the approximate original contour by blending the spoil into the surrounding terrain if the following requirements are met:

* * * * * * *

(3) The spoil shall be backfilled and graded on the area in accordance with the requirements of this section. [Emphasis added.]

This regulation is quite clear that if the spoil is not "excess spoil," it shall be returned to the mined-out area. 30 CFR 816.102(b). However, spoil (even though it is not "excess spoil") may be placed out-side the mined-out area in non-steep-slope areas to restore AOC by blend-ing the spoil into the surrounding terrain if certain conditions are met. 30 CFR 816.102(d). Notably, one such condition is that the spoil be backfilled and graded on the area in accordance with the requirements of this section, e.g., backfilled and graded on the area to achieve the AOC of the land. 30 CFR 816.102(a)(1).

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fn. 8 (continued)
the affected land. Thus, this exception only applies to situations where the operator proposes to "remove an entire coal seam or seams running through the upper fraction of a mountain, ridge or hill," and only steep-slope areas.

This interpretation of 30 CFR 816.102 is supported by reference to the definitions of "spoil" and "excess spoil" at 30 CFR 701.5. "Spoil" is defined as "overburden that has been removed during surface coal min-ing operations." The term "excess spoil" is defined as "spoil material disposed of in a location other than the mined-out area; provided that spoil material used to achieve the approximate original contour or to blend the mined-out area with the surrounding terrain in accordance with §§ 816.102(d) and 817.102(d) of this chapter shall in non-steep slope areas not be considered excess spoil." (Emphasis added.)

Pacific Coast's argument that Spoil Pile Nos. 1, 2, and 3 are composed of "excess spoil" not subject to AOC requirements is based upon the provision in the AOC definition at section 701(2) of SMCRA which allows the creation of water impoundments when the regulatory authority determines that they are in compliance with section 515(b)(8) of SMCRA. The only mention of "grading" contained in section 515(b)(8) is that it "provide adequate safety and access for proposed water users." Section 515(b)(8)(E) of SMCRA, 30 U.S.C. § 1265(b)(8)(E) (1988). Pacific Coast maintains that this is the only grading requirement with regard to spoil and AOC when a water impoundment is involved. See Applicant's Appeal Brief before Judge Child at 14-15. In our view, this adequate safety and access provision does not even address the question of how the operator is to dispose of the spoil which would otherwise be returned to the mine pit that becomes the impoundment. It cannot be read as superseding the AOC standards of section 515(b)(3) of SMCRA and 30 CFR 816.102.

In his Decision Memorandum, the Project Manager, Federal and Indian Permitting Branch, OSM, interpreted and applied the AOC requirements of section 515(b)(3) and 30 CFR 816.102 in accordance with our summary set forth above. He recommended denial of Pacific Coast's permit revision application on the basis that Pacific Coast was required to eliminate Spoil Pile Nos. 1, 2, and 3, and achieve AOC in accordance with section 515(b)(3) of SMCRA and 30 CFR 816.102. We set forth the Project Manager's supporting analysis below:

> The land disturbed was a gently-sloped bench between hills to the east and south and an escarpment on the west and north which slopes down to broad valley bottom of Rock Creek. Most slopes in the disturbed area were less than 10h:1v [10%]. The surrounding terrain consists of rounded hills with slope steep-ness generally decreasing with elevation.
>
> Postmining slopes may vary from the approximate original contour only under certain circumstances, none of which occur at the John Henry No. 1 mine. [30 CFR 816.102(a) and (k)]
>
> To achieve approximate original contour, the reclaimed area should closely resemble the general surface configuration of the land prior to mining. The general terrain should be comparable to the premined terrain; that is if the area was basically level or gently rolling before mining, it should retain those general features after mining. Water intercepted within or from the surrounding terrain should flow through and from the reclaimed area in an unobstructed and controlled manner. All highwalls and spoil piles must be eliminated in a manner which blends in with the surrounding terrain. [OSMRE Directive INE-26, Approximate Original Contour.]
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> * * * * * * *
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> In its response to OSM's [Sept. 19, 1989, technical deficiency letter stating that the proposed surface configuration does not closely resemble the pre-mining configuration], PCCC asserted that requirements to eliminate spoil piles and achieve approximate original contour do not apply to the "excess spoil" created by the proposed impoundment. PCCC asserted that the U.S. Court of Appeals decision on retention of underwater highwalls supported its position.

> In the decision of the U.S. Court of Appeals for the District of Columbia Circuit in National Wildlife Federation v. Hodel, [839 F.2d 694 (D.C. Cir. 1988)], the court affirmed that approval of permanent impoundments constitutes a specific vari-ance from approximate original contour requirements at 30 CFR 816.102(a) in that "the water impoundment grading requirements do not include a highwall elimination requirement." The court did not state that the specific variance extended to spoil piles and the requirement to achieve approximate original contour elsewhere in the disturbed area.

(Decision Memorandum at 4-6).

In its brief before Judge Child, Pacific Coast maintains, contrary to OSM's decision, that section 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), which requires an operator to restore the affected land to AOC, with all highwalls and spoil piles eliminated, is not applicable to its permit revision application. Pacific Coast argues that the only requirements which pertain to the creation of permanent water impoundments are found at section 515(b)(8) of SMCRA, 30 U.S.C. § 1265(b)(8), quoted supra, and more specifically, that the only requirement with respect to "final grading" of permanent impoundments is to "provide adequate safety and access for proposed water users." Section 515(b)(8)(E) of SMCRA, 30 U.S.C. § 1265(b)(8)(E) (1988).

In Pacific Coast's view, "premised upon the appropriateness of a statutorily authorized permanent impoundment herein, the pivotal issue is: what is to become of the excess overburden or other spoil and waste material that is not returned to the mine pit, which is to become a permanent impoundment or 'final-cut' lake" (Applicant's Appeal Brief at 16).

Pacific Coast contends that the spoil and waste material which is not returned to the mine pit is "excess spoil," to be disposed of in accord-ance with section 515(b)(22) of SMCRA, 30 U.S.C. § 1265(b)(22) (1988), which does not mention AOC requirements, but provides that the "final configuration" of excess spoil is to be 'compatible with the natural drainage pattern and surroundings and suitable for intended uses'" (Applicant's Appeal Brief at 17). See 30 U.S.C. 1265(b)(22)(G) (1988). Thus, accord-ing to Pacific Coast, the controlling standards with respect to permanent impoundments and excess overburden or spoil material are found exclusively at sections 515(b)(8) and (22) of SMCRA.

Further, Pacific Coast asserts that the Department's regulations "confirm the above conclusions" (Brief at 17). Pacific Coast reviews the regulations set forth supra, and emphasizes in particular 30 CFR 816.102(b), which provides that "[s]poil, except excess spoil disposed of in accordance with §§ 816.71 through 816.74, shall be returned to the mined-out area." Pacific Coast's reasoning that it is not required to return the spoil piles to AOC is set forth below:

> Again premised upon the appropriateness and approval of the permanent impoundment herein, the mined overburden or spoil would not, and could not, be returned to the "mined-out area." If such "spoil" is not returned to the mined-out area, it is not subject to AOC (see § 701.5 definition of AOC) and is by definition "excess spoil" (see § 701.5 definition). As recited in 30 CFR 816.102(b), excess spoil is to be disposed of in accordance with §§ 816.71 through 816.74 and not in accordance with § 816.102(a).

(Applicant's Appeal Brief before Judge Child at 19). Thus, Pacific Coast concludes that since it "has complied with the provisions of § 816.71 with

respect to excess spoil, the Modified Permit Revision Application should have been approved by OSM." Id. at 20.

Pacific Coast maintains that

> the 2 pertinent cases do confirm (i) that by definition, the AOC requirements of Section 515(b)(3) of SMCRA are only applicable to the 'mined area,' (ii) that the provisions of Section 515(b)(8), and not Section 515(b)(3), are applicable to permanent impoundments, and (iii) that the spoil created by an approved permanent impoundment is to be treated as 'excess' spoil.

Id.

The two cases upon which Pacific Coast relies are National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988), and Illinois South Project, Inc. v. Hodel, 844 F.2d 1286 (7th Cir. 1988), which we will consider infra.

Should the Board conclude that the disposal and reclamation of spoil from the John Henry No. 1 Mine is not subject to section 515(b)(22) of SMCRA and 30 CFR 816.71 through 816.74, but rather is subject to section 515(b)(3) of SCMRA and 30 CFR 816.102(a) with regard to AOC, Pacific Coast advances the following alternative argument. Pacific Coast states that neither section 515(b)(3) of SMCRA nor 30 CFR 816.102(a) "specific-ally quantify the postmining configuration; rather, both require grading to restore the AOC of the land, with all highwalls, spoil piles, and depressions eliminated" (Brief at 34). Pacific Coast recognizes that both

section 701(2) of SMCRA and 30 CFR 701.5 define AOC to mean "that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area * * * closely resembles the general surface configura-tion of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated." However, Pacific Coast quotes OSM Directive INE-26, "Approximate Original Contour," dated May 26, 1987, as not "necessarily requiring spoil from the first cut to be transported to fill the last cut in area mining, provided highwalls are eliminated and both cuts are graded to blend in with the surrounding terrain" (Brief at 35, quoting OSM AOC Directive at 3).

Pacific Coast places its mining operation into the context of "box-cut" mining, stating that in Illinois South Project, Inc., supra, the Seventh Circuit "specifically recognized the concepts of first-cut spoil, 'box-cut' mining, leaving the last cut as a lake, and leaving the first- cut spoil outside the mined-out area as excess spoil" (Brief at 35). Moreover, Pacific Coast states that "[t]his 'box-cut' mining sequence is also recognized and sanctioned pursuant to the OSM AOC Directive." Id. at 38. Thus, Pacific Coast concludes that OSM's denial of its permit revision application on the basis that the spoil piles must be eliminated under sections 515(b)(3) and 816.102(a) is in error.

In his decision dated December 5, 1990, Judge Child rejected Pacific Coast's arguments, concluding that "PCCC's logic fails by reason of its misreading of the statutes and the regulations" (Decision at 8). He

emphasizes initially that the definition of AOC at section 701(2) of SMCRA includes the statement that "water impoundments may be permitted where the regulatory authority determines that they are in compliance with section 1265(b)(8) of this title" (Decision at 8, quoting Section 701(2) of SMCRA (emphasis added by Judge Child)). Thus, in his view, Congress "left the discretion with the regulatory authority whether to permit or authorize the proposed water impoundment in furtherance of the purposes of SMCRA" (Decision at 9). He reasons as follows:

> In exercising that discretion, respondent [OSM] is free to consider what adverse effects, if any, a permitted water impoundment would have upon the surrounding landowners, the principal landowner, the community, the environment, society and such other factors as may pertain to accomplish the purposes of SMCRA as set forth at Section 102 of the Act (30 U.S.C. § 1202). Necessary in such deliberation would be a weighing in the balance of the relative need or utility of an impoundment viz a viz [sic] the possibly excessive spoil material which could remain as a result of not utilizing it as backfill as otherwise contemplated by the Act and implementing regulations.

(Decision at 9).

Judge Child quotes from section 515(b)(8) of SMCRA, which provides for the creation of permanent impoundments of water, "if authorized in the approved mining and reclamation plan and permit." In his view, this section "makes it clear that only if the permanent impoundment of water on the mining site is authorized in the approved mining and reclamation plan will the mandatory criteria governing creation of the impoundment come into play or necessarily be effected" (Decision at 9; emphasis in original). Thus, "the regulatory authority after due deliberation might well decide

that spoil piles which would remain in the event an impoundment is permit-ted would be too high a price to pay absent a showing of overriding need for the impoundment." Id. at 10.

Judge Child rejects Pacific Coast's contention that OSM Directive INE-26 countenances its permit revision application, even though the OSM Directive "appears to permit deviation from the objective of achieving approximate original contour in accomplishing reclamation under particular circumstances and particularly points up the practice in 'area mining' of not necessarily requiring the spoil from the first cut to be transported to backfill the last cut." Id. Judge Child states:

> According to the Directive, the practice could be excused only if both the first and last cuts are graded to blend in with the surrounding terrain. There has been no showing here that spoil in proposed permanent Piles Nos. 1, 2 and 3 came from the "first cut;" nor is it evident that the proposed impoundment would be at the "last cut" of its mining operation. Finally, INE-26 is speaking of accomplished reclamation which fails to achieve approximate orig-inal contour and whether to require corrective measures in the face of newly sewn seeding or vegetation.

Id.

Judge Child was unpersuaded that under Illinois South Project, Inc., "allowing the last cut to become a lake in the course of 'Box Cut' or 'Area mining' would render the spoil removed from the first cut in effect 'excess spoil' subject to the regulations applying to the treatment of 'excess spoil.'" Id. at 10-11. He disposed of this argument in the following terms:

> PCCC's reliance on the Illinois case is without basis. After dis-cussing the nature of excess spoil and describing the distance which sometimes occurs between the first and last cuts in following 'area mining,' the court there said: 'Illinois cannot pro-test that the spoil created by permitted lakes is treated as excess.' (emphasis added) PCCC's proposed impoundment has not been permitted and the spoil presently or projected to occupy the disturbed area in the course of mining is by the approved permit deemed to be temporary structures contemplated to be removed for purposes of backfill and attaining approximate original contour of the disturbed area. [Emphasis in original.]

Id. at 11.

Judge Child recognized that 30 CFR 816.102(k) provides for certain exceptions to the general requirement that disturbed areas shall be backfilled and graded to achieve AOC and that all spoil piles be eliminated, but he concluded that Pacific Coast had "not established that any of said exceptions here apply." He concluded:

> PCCC's Permit Revision Application fails to accommodate the requirements of the regulation at 30 CFR 816.102(a) by its gross failure to provide for (1) elimination of spoil piles and (2) achievement of approximate original contour. As such, absent a showing of exception or authorized variance, the modified Permit Revision Application is legally deficient and was properly disapproved.

Id.

In its petition for discretionary review, Pacific Coast states that "OSM's authority, discretionary or otherwise, to approve or deny a perma-nent impoundment has never been an issue herein. Rather, the issue is: what disposal standards are applicable in OSM's review of the Modified

Permit Revision Application with respect to the surplus (excess) spoil which is attendant to the creation of a permanent impoundment" (Petition at 10). Pacific Coast emphasizes that OSM stipulated for purposes of this appeal that "PCCC's compliance with applicable permanent impoundment criteria and the proposed post-mining land use is not disputed" (Stipula-tion of Undisputed Facts supra at "V"). Pacific Coast maintains that Judge Child erred in rejecting its argument that "the express exception of 30 CFR 816.102(b) supersedes the general provision of 30 CFR 816.102(a) with respect to the disposal of excess spoil attendant to the creation of a permanent impoundment or final-cut lake," and that "[i]n the alternative, Pacific Coast argue[s] that the Modified Permit Revision Application does comply with the statutory regulatory requirements for box-cut mining, final-cut lakes, and the reclamation of attendant spoil piles," again citing Illinois South Project, Inc. and OSM Directive INE-26 (Petition at 12).

[2] For the reasons set forth below, we affirm Judge Child's December 5, 1990, decision. The definition of "approximate original contour" at section 701(2) of SMCRA simply provides, in pertinent part, that "water impoundments may be permitted where the regulatory authority determines that they are in compliance with section 515(b)(8) of this Act" (emphasis added). We construe this provision to mean that if OSM permits the creation of a water impoundment, the impoundment must comply with section 515(b)(8) of SMCRA. However, whether OSM properly denies an application which proposes the creation of a permanent water impoundment depends not merely upon whether it meets the criteria of section 515(b)(8) of SMCRA.

Other factors may be determinative. In the instant case, a critical factor in evaluating Pacific Coast's permit revision application concerns what Pacific Coast proposes to do with the spoil which otherwise would be returned to Pit No. 1 in accordance with the permit as approved by OSM.

In this connection, Pacific Coast maintains that because OSM must approve the permit revision application since it complies with section 515(b)(8) of SMCRA, the spoil that otherwise would have filled the impoundment must be disposed of as "excess spoil" under section 515(b)(22) of SMCRA and 30 CFR 816.71. In its view, section 515(b)(3) of SMCRA and 30 CFR 816.102(a) do not apply.

We cannot agree. In our view, the mandate of section 515(b)(3) of SMCRA and 30 CFR 816.102(a) is quite clear. We find no support in the plain wording of the statute or in the legislative history to support the proposition that in providing for the creation of water impoundments, Congress intended that spoil from permitted impoundments would automatically and necessarily become excess spoil not subject to section 515(b)(3) of SMCRA, thus relieving the operator of the obligation to "backfill * * * and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated."

National Wildlife Federation, which, according to Pacific Coast, supports its argument that Spoil Pile Nos. 1, 2, and 3 contain excess spoil not subject to the AOC requirements of section 515(b)(3) of SMCRA and 30 CFR 816.102(a), involved regulations promulgated by the Department

on September 26, 1983 (see 48 FR 44004), including 30 CFR 816.49(a)(9). This regulation permits vertical highwalls to remain in permanent impoundments provided "[t]he vertical portion of any remaining highwall shall be located far enough below the low-water line along the full extent of highwall to provide adequate safety and access for the proposed water users." 9/

In considering the validity of this regulation, the Circuit Court noted that "[e]ven where Congress allowed exceptions to the general AOC restoration requirement, it still explicitly required the elimination of highwalls. See SMCRA § 515(c), (e)." 839 F.2d at 759. Even so, the Circuit Court felt that "water impoundments constitute a third specific variance from AOC requirements (in addition to those found in § 515(c), (e))." [10/] However, the court stated:

> Unlike the other two AOC variances, the water impoundment grad-ing requirements do not include a highwall elimination requirement. Instead, an operator wishing to create a permanent water impoundment must show, among other things, that "final grading

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9/ The District Court had remanded the regulation as inconsistent with the AOC requirements of SMCRA, stating that it was "wary of permitting highwalls to remain in impoundments under an 'implied' exception to AOC,
when Congress did not even permit the retention of highwalls when granting express exemptions from AOC." In re Permanent Surface Mining Regulation Litigation, supra at 1571.

10/ As noted supra, section 515(c) of SMCRA provides for a variance from AOC requirements when the "mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill * * * by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining." Section 515(e)(2) of SMCRA allows for a variance from AOC in situations where such variance will "render the land, after reclamation, suitable for an industrial, commercial, residential, or public use," provided that "complete backfilling with spoil material shall be required to cover completely the highwall * * *." See 30 U.S.C. § 1265(e)(1) (1988).

> will provide safety and access for proposed water users." SMCRA § 515(b)(8)(E).

839 F.2d at 760.

Pacific Coast infers from National Wildlife Federation that if highwalls need not be eliminated from permanent impoundments, then spoil which would otherwise be returned to an impoundment is not subject to AOC. We disagree. As noted, the court viewed the regulation allowing the retention of highwalls in water impoundments as a specific third variance from the AOC standard. What Pacific Coast neglects to consider is that the court, in a separate portion of its decision, addressed the subject of OSM's general authority to grant variances from AOC pursuant to section 515(e) of SMCRA. The court was presented with the question whether the variance power described in section 515(e) relates solely to the steep slope requirements set out in section 515(d)(2), or should be read to permit a general variance to the requirements of section 515(b)(3) that operators restore the disturbed land to AOC. The court, having reviewed the legislative history of section 515(e), concluded:

> Ultimately we rely on the text of § 515(e)(2) which specifically states that variances may be granted from the AOC requirements of § 515(d)(2), the steep slope mining provision; it does not, as enacted, state that non-steep slope mining AOC requirements may be waived or excused, and neither does it reference § 515(b)(3), the general AOC provision. A variance provision similar in structure, § 515(c), expressly allows for disregarding the AOC requirements of both § 515(b)(3) and 515(d)(2) under certain circumstances. See 515(c)(2). Although we might speculate about the reasons why the reference to § 515(b)(3) (which was once a part of the variance amendment), was deleted by the Conference

> Committee, that unexplained deletion alone does not persuade us to read into a statute a provision that is not there. [Emphasis in original.]

839 F.2d at 763-64.

Thus, the AOC variance provisions of section 515(c) and (e) of SMCRA relate solely to steep-slope mining. We conclude that Pacific Coast's proposal to retain the three spoil piles as permanent topographical features in a non-steep-slope area is contrary to section 515(b)(3) of SMCRA, which requires an operator to return disturbed land to AOC, "except as provided in subsection (c) of [section 515]." In recognizing the retention of underwater highwalls as a third exception to the AOC requirement, the Circuit Court in National Wildlife Federation observed that "Congress * * * has not stated that highwalls completely submerged in an authorized impound-ment must be removed." 839 F.2d at 760. We draw a distinction between a completely submerged highwall on the one hand and a spoil pile which is retained in an area where the terrain is described as "gently rolling" on the other hand. While Congress has not mandated that highwalls completely submerged in an authorized impoundment must be removed, it has mandated that an operator must return the spoil, as well as the areas upon which the spoil is placed, to AOC in accordance with section 515(b)(3) of SMCRA and implementing regulations.

A review of the applicable regulations leads inevitably to the same conclusion. For example, in the preamble to the final rule pertaining to

alternative post-mining land uses, OSM stated that "[a]pproval of an alternative land use does not itself relieve the operator of the responsibility to return the land to its approximate original contour." 44 FR 14902, 15243 (Mar. 13, 1979).

Moreover, as initially proposed, 30 CFR 816.102(a)(2) provided that "[s]poil shall be--(1) [r]etained in the mined-out area, unless disposal elsewhere in the permit area is approved; [and] (2) [b]ackfilled and graded to * * * [e]liminate all highwalls, spoil piles, and depression[s] * * *." 47 FR 26760, 26767 (June 21, 1982) (proposed § 816.102 (b)). However, as promulgated, the word "spoil" was changed to "disturbed areas" for the following reason: "OSM has replaced the word 'spoil' with the more inclusive term 'disturbed areas' to indicate that there are other areas that may require backfilling and grading in addition to the mined-out area * * *." 48 FR 23356, 23358 (May 24, 1983). In the preamble to this final rulemaking, OSM pointed to the definition of "disturbed area" at 30 CFR 701.5 as meaning "an area where vegetation, topsoil, or overburden is removed or upon which * * * spoil * * * is placed by surface coal mining operations." 48 FR at 23358. Thus, contrary to Pacific Coast's contention, an operator must backfill and grade an area upon which spoil is placed to achieve AOC, in addition to backfilling and grading the mined-out area.

Further, the preamble to the excess spoil disposal regulations at 30 CFR §§ 816.71 through 816.74 removes any doubt that the AOC require-ments apply to Pacific Coast's spoil piles. As previously noted, the term "excess spoil" is defined as "spoil material disposed of in a

location other than the mined-out area, provided that spoil material used to achieve the approximate original contour or to blend the mined-out area with the surrounding terrain in accordance with §§ 816.102(c) * * * of this chapter in nonsteep slope areas shall not be considered excess spoil." In its preamble to the final rulemaking, OSM explained the definition:

> Before spoil can be moved from the mined-out area to an excess spoil fill, the operator must meet the approximate original contour (AOC) restoration and highwall elimination requirements, or fall within variances thereto, in sections 515 and 516 of [SMCRA] and in §§ 816.102 - 816.107 * * *. The excess spoil is then subject to the requirements of Section 515(b)(22) of [SMCRA] and the provisions of §§ 816.71 - 816.74 * * *.
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> * * * * * * *
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> In the final rule, spoil used to merely blend the mined out area with the surrounding terrain need not be treated as excess spoil. Thus, spoil from box cuts or first cuts in non-steep slope areas would not be excess spoil when it is used to achieve approximate original contour, i.e., to blend the mined-out area into the surrounding terrain according to § 816.102 of the backfilling and grading rules. Even though the spoil in these cases is disposed of in a location other than the mined out area, specifically around the box cut or first cut to blend it into the terrain, the rules for excess spoil would not be applicable. Rather, the standards for backfilling and grading would govern.

48 FR 32910, 32911 (July 19, 1983).

We find ourselves in agreement with OSM's summary of the regulations applicable to Pacific Coast's permit revision application:

> [E]ven assuming, arguendo, that Pacific Coast's proposed permanent impoundment is permitted, and further acknowledging that the box

> cut spoil 27/ in Spoil Pile Nos. 1, 2 and 3 will be disposed of outside the mined-out area, because of the requirement to return the disturbed area, i.e., the area underlying Spoil Pile Nos. 1, 2 and 3, to its pre-mining approximate original contour, the spoil in Spoil Pile Nos. 1, 2 and 3 is not, and cannot be treated as, excess spoil. Thus, even though Spoil Pile Nos. 1, 2 and 3 will be disposed of outside the mined-out area, in the words of the preamble to the excess spoil disposal regulations, "the rules for excess spoil [will] not be applicable. Rather, the standards for backfilling and grading [at 30 C.F.R. § 816.102(a) will] govern."
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> 27/ On page 30 of its brief, Pacific Coast concedes that the spoil in Spoil Pile Nos. 1, 2 and 3 is "box cut" spoil. [Empha-sis in original.]

(OSM's Response to Applicant's Appeal Brief at 26-27).

We likewise reject Pacific Coast's alternative argument, i.e., if the "excess spoil" from the John Henry No. 1 Mine is not subject to sec-tion 515(b)(22) of SMCRA and 30 CFR 816.71 - 816.74, its permit revision application still complies with the applicable statutory and regulatory criteria with regard to box-cut spoils, final-cut lakes, and the reclama-tion of spoil piles attendant thereto. See Pacific Coast's Brief at 33 et seq. As previously noted, Pacific Coast supports this alternative argument with OSM Directive INE-26 and Illinois South Project, Inc. v. Hodel, supra. We agree with OSM that "(1) Pacific Coast has misapplied the provisions of OSM Directive INE-26 to the facts of the present case; and (2) the ruling in the Illinois South case is not directly applicable to the facts of the present case" (OSM Response at 29).

In Illinois South, the Seventh Circuit summarized Illinois South's description of the practice of box-cut in the following terms:

> [T]he mine operator removes the overburden in a long, thin strip known as a "box cut" and lays the spoil on the ground away from the seam of coal. Then the operator removes the coal from the first cut and makes a second box cut, putting the spoil from the second cut in the pit produced by the first. This reduces costs; instead of removing overburden, storing and returning it (handling everything twice), the operator moves most of the spoil only once. The process continues until the mining is completed. The last cut may be far away from the first. The operator leaves the first cut spoil where it is and neglects to fill the last cut. Eventually nature fills the last cut with water.

844 F.2d at 1292.

Assuming, arguendo, that Pacific Coast's operations at the John Henry No. 1 Mine fit the above description, we fail to see how OSM Directive INE-26 absolves Pacific Coast of the responsibility of returning the spoil piles to AOC. OSM issued Directive INE-26 to "provide policy guidance and procedures for determining whether backfilling and grading have met the requirements of approximate original contour as defined in sections 701(2) of the Act, sections 701.5 and 710.5 of the regulations and the corresponding definitions in approved State programs." With regard to spoil piles, the OSM Directive states:

> All highwalls, spoil piles, and depressions, * * * shall be eliminated in a manner which blends in with the surrounding terrain. This element should not be interpreted as necessarily requiring spoil from the first cut to be transported to fill the last cut in area mining, provided highwalls are eliminated and both cuts are graded to blend in with the surrounding terrain. See 43 FR 62643, December 13, 1977; 44 FR 15227, March 13, 1979; and 48 FR 32911 (July 19, 1983). [Emphasis added.]

Based upon the facts in the record, we are unable to determine whether the spoil in Spoil Pile Nos. 1, 2, and 3 does, in fact constitute Pacific

Coast's "first cut" spoil, and that the site of its impoundment is, in fact, the "last cut" of its mining operation. OSM argues that "Pacific Coast's 'life-of-mine' plan appears to indicate that Pacific Coast's final cut will, in fact, be located some distance to the southwest of the site now proposed for the permanent impoundment" (OSM Response at 31). Given the wording of OSM Directive INE-26, we need not resolve the issue of whether Pacific Coast's operations fit precisely into the practice of "box-cut" mining described in Illinois South Project. To adopt OSM's analysis, "[e]ven assuming, arguendo, that the site of the proposed impoundment is the final cut, and that the spoil in Spoil Pile Nos. 1, 2 and 3 is the first cut, both cuts must still, in the words of OSM Directive INE-26 'be graded to 'blend' in with the surrounding terrain'" (OSM Response at 31).

Paragraph 3.c.(2)(b) of OSM Directive INE-26 indicates that "[t]he test applied to determine if the reclaimed area blends into and complements the drainage pattern of the surrounding area is whether water intercepted within or from the surrounding terrain flows through and from the reclaimed area in an unobstructed and controlled manner." However, the OSM Directive makes clear that whether the reclaimed area "blends" with the drainage pattern of the surrounding area is one criterion to be applied in determining whether AOC has been achieved, not the sole criterion. Paragraph 3.c.(2)(a) indicates that in reaching an AOC determination, OSM must consider whether "[t]he reclaimed area * * * closely resemble[s] the general surface configuration of the land prior to mining." The directive sets forth the following parameters:

> This should not be interpreted, however, as requiring that postmining contours exactly match the premining contours or that long uninterrupted premining slopes must result in the same. Rather, the general terrain should be comparable to the premined terrain; that is, if the area was basically level or gently rolling before mining, it should retain these general features after mining.

(OSM Directive INE-26, paragraph 3.c.(2)(a)). We observe that this directive closely tracks the definition of AOC embodied in section 701(2) of SMCRA and 30 CFR 701.5.

Thus, Judge Child properly concluded that OSM Directive INE-26 does not support Pacific Coast's argument that it need not return the spoil piles to AOC. In our view, the directive supports the opposite conclusion, i.e., Pacific Coast's proposal to leave Spoil Pile Nos. 1, 2, and 3 at the elevations proposed, in an area which, according to the parties' Stipulation of Undisputed Facts, is "generally low in surface relief," is contrary to the AOC standards of section 515(b)(3) of SMCRA and 30 CFR 816.102.

Moreover, Pacific Coast's reliance upon Illinois South Project is equally misplaced. Pacific Coast asserts that "the Illinois South Opinion specifically recognized the concepts of first-cut spoil, 'box-cut' mining, leaving the last cut as a lake, and leaving the first-cut spoil outside the mined-out area as excess spoil" (Applicant's Appeal Brief at 35). A reading of Illinois South indicates that while the court recognized such concepts, it by no means countenanced their unfettered practice. As to the practice of "box-cut" mining in which "[t]he operator leaves the first cut spoil where it is and neglects to fill the last cut," the court stated: "[W]e do not doubt that if things are as stark as this, Illinois is out of

compliance with the Act." 844 F.2d at 1292. Illinois South argued that "the practice persists because Illinois 'allows operators to automatically treat their box cut spoil as excess spoil' * * * that may be left in place." Id. The court responded that it did not "see in the state regulations blanket permission for the practice Illinois South describes."

> There is nothing "automatic" about the privilege to treat spoil as "excess"; that may be done only when "the final thickness is greater than 1.2 of the initial thickness", §1816.105(a), and even then only when "surface mining activities cannot be carried out to comply with the Section 1816.101 [sic] to achieve the approximate initial contour." [Emphasis added.]

844 F.2d at 1292-93.

In response to Illinois South's objection that 62 Ill. Admin. Code § 1816.71(g)(2) allows operators to leave a final slope as steep as 25 percent on excess spoil, the court quoted the language of the regulation, which provides that "[b]ox cut spoils shall blend with undisturbed land with a maximum outslope steepness of twenty-five (25) percent (4h:1v)." 844 F.2d at 1293, quoting 62 Ill. Admin. Code § 1816.71(g)(2) (emphasis in original). According to the court's interpretation of this regulation, "the mine operator may select a slope as steep as 25% in order to match a hilly terrain. It is hard to read this language as permitting disruptive, unsightly walls of spoil to be scattered willynilly through Illinois." 844 F.2d at 1293.

We find no reason to interpret the court's analysis of 62 Ill. Admin. Code § 1816.71(g)(2) as inconsistent with the definition of AOC embodied in

section 701(2) of SMCRA and 30 CFR 701.5, i.e., "that surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area * * * closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated." As noted by OSM, the court "merely said that operators must match hilly terrain with hilly terrain, and implicitly, that operators must match flat terrain with flat terrain" (OSM Response at 39). Further, we agree with OSM's application of Illinois South to Pacific Coast's case:

> [I]f the disturbed area was "gently rolling" or relatively flat prior to mining, notwithstanding the fact that there might be some 33% slopes "in the general vicinity", the disturbed area must, in the words of the court, "match" that same general sur-face configuration after mining. In the present case, this can only be done if, consistent with section 515(b)(3) of SMCRA, and 30 C.F.R. § 816.102(a), Spoil Pile Nos. 1, 2 and 3 are eliminated, or at least graded to achieve the pre-mining approximate original contour. [Emphasis in original.]

(OSM Response at 39-40). 11/

11/ Our ruling herein does not mean that Pacific Coast is required to return the areas upon which the spoil piles are located to their exact original contour. In its response to Pacific Coast's brief filed before Judge Child, OSM placed the AOC requirements, as they apply to Pacific Coast's John Henry No. 1 Mine, into the following perspective:

"OSM recognizes that in lieu of completely eliminating Spoil Pile Nos. 1, 2 and 3, it would be possible for Pacific Coast to level or otherwise grade such piles in a manner which would achieve the approximate original premining contours of the disturbed area. OSM further recognizes that such an action might well result in the over-all elevation of the post-mining topography being higher than the elevation of the pre-mining topography. However, as evinced by the following legislative history of SMCRA, the Congress never intended that a mere increase in elevation of the post-mining topography would violate AOC provisions:

In conclusion, we rule that OSM properly denied Pacific Coast's permit revision application. Pacific Coast's proposal to retain Spoil Pile Nos. 1 and 2, and a portion of Spoil Pile No. 3, as permanent topographical features, with Spoil Pile No. 2 about 80 feet higher, Spoil Pile No. 3 approximately 20 to 40 feet higher, and Spoil Pile No. 1 approximately 40-60 feet higher than the pre-mining topography, is clearly inconsistent with the AOC standards of section 515(b)(3) of SMCRA and 30 CFR 816.102.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Pacific Coast's petition for discretionary review is granted, and Administrative Law Judge Child's December 5, 1990, decision is affirmed.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

fn. 11 (continued)

"In area mining, the ability to reclaim to approximate original con-tour depends primarily on the quantity of spoil available in relation to the amount of coal removed. * * * The environmental standard imposed intends that the overburden from the first cut will be blended into the undisturbed landscape and mine site and the final cut is backfilled with spoil from several previous cuts as well as from the top of the highwall if desired. In such instances, the actual elevation of the reclaimed land might be higher than the premined lands due to the swell of spoil material." (OSM's Response at 27 n.28, quoting H.R. Rep. No. 218, 95th Cong., 1st Sess. 103 (1977) (emphasis added)).